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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 945

E. E. ELMER, Doing Business As
MISSISSIPPI TESTING LABORATORIES
Petitioner

VS.

UNITED STATES FIDELITY & GUARANTY
COMPANY
Respondent

BRIEF OF RESPONDENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SUBJECT INDEX

	Page
ARGUMENT	3
The Question Involved Has Been Settled Already	4
The Miller Act Is Complete Within Itself and Does Not Depend For Its Effective Operation Upon Arrangements Made By Government Contractors	4
The MacEvoy Decision Is Not Limited To The Status Of A Materialman As A Sub-Contractor	7
Direct Relationship With The Prime Contractor Or A Sub-Contractor Determines The Right To Bring Suit On A Payment Bond	9
CONCLUSION	13
PROOF OF SERVICE CERTIFICATE	14

AUTHORITIES

Basich vs. U. S. use Turner, 159 Fed. (2d) 182	4
E. E. Elmer, doing business as Mississippi Testing Laboratories vs. United States Fidelity & Guaranty Company, 275 Fed. (2d) 89	4
E. E. Elmer, doing business as Mississippi Testing Laboratories vs. United States Fidelity & Guaranty Company, 174 Fed. Sup. 437	4
Hardwood Products vs. Johnson, 137 Fed. Sup. 562	8
MacEvoy vs. U. S. use Tomkins 322 U. S. 102, 88 L. ed. 1163	9
McGregor vs. Merritt-Chapman, 150 Fed. Sup. 323	4
U. S. use Halloran vs. Frederick Raff Co., 271 Fed. (2d) 415	4
U. S. use Newport News vs. Blount, 168 Fed. Sup. 407	4
U. S. use Pandolf vs. Nassif, 194 Fed. (2d) 912	4

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ARGUMENT

We disagree with counsel for the petitioner that the decision complained of is based upon an erroneous interpretation of the **MacEvoy** case or that it conflicts with, rather than follows that case.

We submit that the decision complained of does not constitute an erroneous decision on a question of federal law of far-reaching importance which has not been decided, but which needs to be settled by this court.

The Question Involved Has Been Settled Already

The federal question of far-reaching importance was long since settled by this court in the **MacEvoy** case, which is plain and unequivocal, and which embraces every legal principle involved in the decision complained of. Since the **MacEvoy** decision there have been few reported cases on the subject. It was made the basis of decision by the district courts in:

U. S. use Newport News vs. Blount, 168 Fed. Sup. 407 (Md. Dist.) (11/25/58)

E. E. Elmer, doing business as Mississippi Testing Laboratories vs. United States Fidelity & Guaranty Company, 174 Fed. Sup. 437

It was not followed in **McGregor vs. Merrit-Chapman, 150 Fed. Sup. 323 (Pa. Dist.) (4/26/57).**

It was the basis of decision by the Court of Appeals for the 2nd Circuit in **Basich vs. U. S. use of Turner, 159 Fed. (2d) 182 (9th) (12/26/46)** and in **United States, use W. J. Halloran Steel Erection Co. vs. Frederick Raff Company, Inc., Advance Sheets 271 Fed. (2d) 415 (1st Cir.) (11/24/53)**, by the 1st Circuit in **U. S. use Pandolf vs. Nassif, 194 Fed. (2d) 912 (1st) (3/6/52)**, and now by that of the 5th Circuit in **E. E. Elmer, doing business as Mississippi Testing Laboratories vs. United States Fidelity & Guaranty Company, 275 Fed. (2d) 89.**

The Miller Act is Complete Within Itself And Does Not Depend For Its Effective Operation Upon Arrangements Made by Government Contractors.

We see no good purpose to be served in discussing such cases as the **Hill** case, the **Mankin** case, and the **Illinois Surety Company** case cited by the petitioner, which hold that a furnisher to a sub-contractor is protected by the Heard Act. It is true that those cases suggest that the prime contractor may protect himself by requiring bond from his sub-contractor, but that is as far as the suggestion goes. We know of no case which suggests a method of bond protection beyond the sub-contractor.

Counsel for petitioner states in his brief that the Miller Act should be construed so as to give it as broad a scope and coverage as can be, without placing remote and undeterminable liabilities on the prime contractor and his surety. Counsel then urges that the prime contractor may free himself from remote liabilities by usual and ordinary procedures.

Vast government projects frequently involve a wide range of complex activities of wholly different nature and requiring wholly different equipment, knowledge, and capabilities, for execution. These activities on one project may range from the excavation of dirt and rock to the fabrication and installation of the most delicate scientific instruments. It is seldom that the prime contractor undertaking a sizable government project of diverse aspects is prepared to do all the work himself. He usually re-lets, and those to whom he re-lets, further re-let, with the purpose of placing the entire job in the hands of those prepared to accomplish its various parts. As a matter of fact, it is not unusual on a large government construction project to have as many as 15 or 20 tiers of contractors all engaged at the same time upon various phases of the work undertaken by the prime contractor.

Of course, upon making a sub-contract, the prime contractor could require the sub-contractor to contract to per-

form the work himself and contract not to re-let any portion of it. Then there could be no claimants except furnishers of labor and materials to the prime contractor and the sub-contractor, and all would be covered by the Miller Act. However, this would be no way for the prime contractor to protect himself against remote liabilities referred to because there would be none. There could be no sub-contractor beyond the first, because prohibited by the contract. No claimant could be remote because all would be direct and immediate.

Also, it might be legally possible for the prime contractor to enforce an arrangement by which all lower tier contractors would be required to give bonds so conditioned that the prime contractor would be protected against the most remote liabilities.

However, such a limitation on the power to contract would not only deprive the prime contractor and the sub-contractor of valuable rights, but would burden the normal processes by which large construction projects are arranged and carried out, which have been pointed out heretofore.

We submit that there is nothing in the Miller Act itself and nothing in its congressional history or in the committee reports dealing with it, which indicates a legislative intent to restrict full freedom of contract or to impose the duty upon a government contractor of so arranging his contractual affairs that the Act will cover every person who may claim its protection. The Act is complete within itself and does not depend for its effective operation upon contractual arrangements.

While on this subject of protection, it may be suggested here that a furnisher of materials or services to a low tier contractor on a large government project has some duty to

protect himself. If he is not satisfied with the credit standing of the contractor with whom he deals, ordinary business prudence would require that he find out if there is a bond for his protection or at least to determine where his contractor stands in relation to preceding contractors on the identical work. Certainly, he is not justified in committing himself blindly to anybody he finds working on the project, in the hope that the Miller Act will protect him regardless of his status.

Counsel says that by the device of successive assignments the bond obligation would be defeated entirely. In the first place, there is nothing in the record to show that the prime contractor assigned anything in the sense that the prime contractor sold or transferred any contractual right against the government or became relieved of any contractual obligation to the government. The prime contractor simply subcontracted the grading and asphalt paving to Scholes and other parts of the original contract to others, but the prime contractor itself remained bound to the government. There is nothing whatever to show that anything was done by the contracting parties to accomplish any substitution of any one for any other.

The MacEvoy Decision Is Not Limited To The Status Of A Materialman As A Sub-Contractor.

Counsel for the petitioner states in his brief "all that was decided in the MacEvoy case was that a materialman was not a sub-contractor within the meaning of the Miller Act."

Since the **MacEvoy** decision there have been contentions in the trial courts in an effort to distinguish that decision from a particular case at bar so as to make it inapplicable to the particular case, and much has been made of the fact that the

McEvoy decision dealt with the rights of a supplier of materials to another supplier of materials. All else is usually referred to as dicta. A careful analysis of the decision will show that this fact was merely incidental. The key to the decision is that the materialman to whom the plaintiff supplied materials was not a sub-contractor because he had not taken from the prime contractor "a specific part of the labor or material requirements of the original contract."

The mere fact that a person dealing with the prime contractor is to furnish only materials has nothing to do with whether he is a sub-contractor. Although he furnishes nothing but materials, he is nevertheless a sub-contractor if by agreement with the prime contractor he furnishes a specific part of the material requirements of the original contract. A good illustration is **Hardwood Products vs. Johnson, 137 Fed. Sup. 562,** where the prime contractor on a post office contracted with a manufacturer to furnish all the millwork, required by the original contract and the supplier of lumber to the manufacturer for making the millwork was held to be a furnisher of materials to a sub-contractor.

If a marble yard delivers to the prime contractor a car load of marble slabs which are used in a building, it would not be a sub-contractor, as it would not have furnished a specific part of the material or labor requirements, and a quarry which supplied the marble yard with the slabs certainly could not recover under the Miller Act bond of the prime contractor. On the other hand, the case would be otherwise if the marble yard contracted with and furnished to the prime contractor all marble, dressed and cut, to fit all material requirements of the original contract for use in the construction of a marble arch in the building, as it would certainly be a sub-contractor, and the quarry could recover on the bond as a furnisher to a sub-contractor.

The fact that a person furnishes only materials in the prosecution of the work does not determine whether he is a sub-contractor, and neither does the fact that he may actually perform in its entirety an integral part of the original contract. His character and status as a sub-contractor or not depends upon whether he contracts with and supplies for the prime contractor a specific part of the requirements of the original contract, regardless of whether that involves materials or services, or both.

Direct Relationship With The Prime Contractor Or A Sub-Contractor Determines The Right To Bring Suit On A Payment Bond.

In the **MacEvoy** case the prime contractor, MacEvoy, entered into contract with the United States for the construction of a defense housing project, and gave the payment bond required by the Miller Act.

MacEvoy purchased from Miller building materials for the work. Miller in turn purchased these materials from Tomkins, who, upon not being paid, sued upon the bond.

The court stated the question for decision thus:

> "The ultimate question in this case, therefore, is whether Miller, the materialman to whom Tomkins sold the goods and who in turn supplied them to MacEvoy, was a sub-contractor within the meaning of the proviso. If he was, Tomkins' **direct** contractual relationship with him enables Tomkins to recover on MacEvoy's payment bond. If Miller was not a sub-contractor, Tomkins stands in too remote a relationship to secure the benefits of bond."

The court then proceeds to define precisely what is meant by the term "sub-contractor" within the contemplation and meaning of the Miller Act, viz:

> "Under the more technical meaning, as established by usage in the building trades, a sub-contractor is one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract * * * "

In holding that Miller was not a sub-contractor and that Tomkins could not recover upon the bond for having furnished to Miller, the court, laid down the rule governing the right to bring suit on a payment bond, which the court stated is limited to:

> "(1) those materialmen, laborers and sub-contractors who deal **directly** with the prime contractor.
>
> "(2) those materialmen, laborers, and sub-contractors who, lacking express or implied contractual relationship with the prime contractor, have **direct** contractual relationship with a sub-contractor."

Counsel argues that unless a furnisher of labor or materials to anybody at all working upon a government contract is protected by the Miller Act bond of the prime contractor, the furnisher will be denied the protection of that bond, where labor or materials are supplied to one who is not a prime contractor or a sub-contractor. We submit that this is certainly correct and is exactly what the **MacEvoy** case holds. The bond protects those who furnish to the prime contractor and it protects those who furnish to any sub-contractor, but the **MacEvoy** case holds that this is as far as it goes when it states:

"Whether this statutory language is broad enough to include persons supplying material to materialmen as well as those in more remote relationships, we need not decide. Even if it did include such persons, we can not disregard the limitations on liability which Congress intended to impose and did impose in the proviso of No. 2(a)."

In the case at bar, the prime contractor made a contract with Scholes to perform the grading and asphalt paving, and in respect to that integral part of the original contract, Scholes was the sole sub-contractor.

Acme Asphalt Company, by contract with Scholes, did part of the paving and thus furnished labor and materials to a sub-contractor.

The plaintiff, Elmer, had no contract with the prime contractor to do anything and he had no contract with sub-contractor, Scholes, to do anything. The oral contract under which the plaintiff, Elmer, performed his services was with Acme Asphalt Company, which concern had no contract with the prime contractor but only with the sole sub-contractor.

However, it must be kept in mind that when Tyler-Hyde made the sub-contract with Scholes, it was not in contemplation of Acme ever being on the work at all, or Acme subsequently bringing Elmer on the work. Scholes could not relet its paving to Acme until after Scholes made its sub-contract with Tyler-Hyde and Acme could not contract with Elmer until after it made its contract with Scholes. In other words, Tyler-Hyde was not a party to any contracting done after it made the sub-contract with Scholes. It had no control over or connection with subsequent contracts made by Scholes, including that made by Scholes with Acme; and it

had no control over or connection with subsequent contracts made by Acme, including that made by Acme with Elmer.

Counsel emphasizes the proposition that Acme Asphalt Company, with which Elmer contracted, was a "performing" sub-contractor. Every person who is a sub-contractor at all is a "performing" sub-contractor.

Under the **MacEvoy** case there is no other kind. Under the definition set forth in that case a sub-contractor is one who "takes from the prime contractor a part of the labor and material requirements of the original contract." One who does that, is bound for performance of a part of the contract, regardless of whether his obligation is carried out and accomplished by actually doing the work undertaken or whether by contracting with others to do it.

Of course, every person who agrees to work for agreed pay is a contractor in a sense, and every man who drives a bull-dozer for the prime contractor on a construction project may be said to be a performing sub-contractor in a sense. He has a contract. He is performing useful and necessary services upon the project for which the prime contractor gets the benefit. The prime contractor knows that he is on the job and is expecting to be paid. But we are not dealing here with grammatical exactitude or merely spinning theories. We are dealing with the term "sub-contractor" in its technical meaning as established by usage in the building trades, which has been specifically defined by this Court as "One who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract."

Therefore, whether one performing services on a government construction project is within the protection of the Miller Act depends upon whether his services are rendered

to and for the prime contractor or to and for a sub-contractor. Nothing else will clothe him with the statutory protection. The fact that his services were valuable, or were necessary, or were rendered in good faith, or were performed on the site, or were well-known to all concerned, or that pay was known to be expected; are all beside the point.

CONCLUSION

We respectfully submit that the **MacEvoy** decision was not misinterpreted by the court below and that the petition for certiorari should not be granted.

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PROOF OF SERVICE CERTIFICATE

I, Joseph A. Covington, of counsel for the respondent, United States Fidelity & Guaranty Company, and a member of the Bar of the Supreme Court of the United States, hereby certify that I served four copies of the foregoing Brief of Respondent To Petition For Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit, upon the petitioner, E. E. Elmer, doing business as Mississippi Testing Laboratories, by depositing the same in a United States Post Office or mail box with first class postage prepaid addressed to Mr. Charles Clark, counsel of record for the said petitioner, at P. O. Box 158, 900 Lamar Life Building, Jackson, Mississippi (the distance being less than 500 miles) on this the 13 day of June, 1960.

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